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QUESTIONS PRESENTED

I. Whether the presumption of vindictiveness established in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), applies when the judge, whose error in sentencing the defendant after a guilty plea results in a reversal on appeal, imposes a longer sentence for the same offense after the defendant is reconvicted in a jury trial.

II. Whether evidence presented at a jury trial relating to commission of the crime, standing alone, may overcome the presumption of vindictiveness resulting when the same judge sentences a defendant, convicted after trial, to a sentence longer than he imposed when the defendant plead guilty for the same offense in his initial conviction, which was set aside on appeal because of the same judge's error in sentencing.

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STATEMENT OF THE CASE

In November 1985, a Montgomery County, Alabama Grand Jury indicted the Respondent, James Lewis Smith, for burglary, rape, and sodomy, all committed in the first degree on the same occasion. Smith agreed to plead guilty to the burglary and rape charges in consideration for the prosecutor's agreement to dismiss the sodomy indictment. (J.A. 4-5) They did not negotiate or agree upon any recommended sentence, and the judge was not involved.

At the January 6, 1986 hearing on the guilty plea, the State and the Respondent affirmed their plea agreement, whereupon the trial judge attempted to ascertain a factual basis for the guilty plea and its voluntary, intelligent, and knowing entry. In response to the judge's questions, Smith alternately was silent, spoke reluctantly, seemed confused, and otherwise manifested physical or mental difficulties which appeared to annoy the judge.[1]

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[1] Smith's actions prompted the court reporter to note three times on the record the fact that Smith was swaying back and forth during the proceeding. The first instance resulted in this exchange involving the judge:

> THE DEPUTY [addressing the Defendant]: What is wrong with you?
>
> THE COURT: Nothing. You have to hold your own. Do you have any questions about this form?
>
> THE DEFENDANT: No sir.
>
> (J.A. 11)

When Respondent swayed for the third time, the Court's reaction was recorded thusly:

> THE COURT: You want to bring the jury around here? I am tired of putting up with him.
>
> MR. SMITH [Defendant's Counsel]: Let him get his breath.
>
> (Pause.)
>
> (Defendant sworn.)
>
> THE COURT: All right. Well, if something is wrong with him,

The sentencing hearing, held on January 17, 1986, began with a statement from the victim (J.A. 19) followed by statements from the judge concerning Smith's letters to him. These letters are not included in the Record and could not be found by Respondent's counsel in the trial court's files. That the letters influenced the judge is apparent from this colloquy at the sentencing hearing:

> THE VICTIM: Before this happened, we were very secure, you know. Like I said, we are all afraid. And we're afraid that if he gets out, he will do it again. And possible just to bother and bring harm to —
>
> THE DEPENDANT [apparently believing the victim was referring to a threat from him]: No, I didn't say that.
>
> [The judge's response was directed to the defendant in the first two sentences; thereafter, he spoke to the defendant's alleged girlfriend]
>
> THE COURT: Basically, that's what you said. You told me in a letter (p.R.22) you did it. He did it because of some of the pressure he had with his problems with you. (Pointing defendant's [sic] girlfriend.) That's what he is saying. And that's what you said in your letter. I have both of the letters. You wrote me. I have both of the letters. You wrote me and told me all about he suspected you of doing something. I believe you perhaps weren't, but he suspected that. That's why he did it, because he was

how did he get straight that quick?
(J.A. 12)

At the end of this proceeding, the judge ordered Smith's incarceration until the sentencing hearing, explaining to counsel: ". . . Mr. Smith, he is having a problem, and to prevent you from having a problem, I'm going to revoke the bond and do a pre-sentence report. He looks like he's trying to go out on you." (J.A. 18)

> having pressure with you. You want to read his letter?
>
> DEFENDANT'S GIRLFRIEND: Yes.
>
> THE COURT: I—you want to read it?
>
> DEFENDANT'S GIRLFRIEND: Yes.
>
> THE COURT: Okay. You go back there and sit down and read it. This is the one you wrote him. Right here. See, I have yours too. In that letter, you sort of understand why he did it because of the suspicions he had which, perhaps, were unfounded, but he, at least, had them. You go back and sit down there and read it.
>
> (p.R.23) MR. SMITH [Defendant's Counsel]: I'll be back. I need to call my office.
>
> (Pause.)
>
> THE COURT: Are you satisfied he did it now?
>
> DEFENDANT'S GIRLFRIEND: (Nods head to indicate the affirmative.)
>
> (J.A. 19, 20)

At the same sentencing hearing, the State successfully invoked the Habitual Offender Act[2] based on the

[2] Alabama's Habitual Offender Act, ALA. CODE § 13A-5-9 (1975), provides that upon conviction for a Class A felony, a defendant with one prior felony conviction must be punished by "imprisonment for life or for any term of not more than 99 years but not less than 15 years." Both first-degree burglary, ALA. CODE § 13A-7-5 (1975) and first-degree rape, ALA. CODE § 13A-6-61 (1975), are classified as Class A felonies, and, as such, are punishable by imprisonment "for life or not more than 99 years or less than 10 years." ALA. CODE § 13A-5-6 (1975). The use of a "deadly weapon" during the commission of a Class A felony mandates a prison term "not less than 20 years." ALA. CODE § 13A-5-6(a)(4).

Respondent's having been previously convicted of a felony.[3] Additionally, trial counsel for Smith sought, unsuccessfully, to have Respondent undergo a mental evaluation prior to sentencing.

> MR. SMITH [Respondent's trial counsel]: After talking to everybody, (p.R.26) he needs to go to Bryce's and be mentally evaluated. I don't know if he was in his right mind at the time of the offense when it was committed, or at the time that he pled guilty up here, based on that letter.
>
> THE COURT: You know he was in his right mind when he pled guilty.
>
> MR. SMITH: I know he almost fainted and he perspirated [sic] and his eyes rolled back in his head and all of that.
>
> THE COURT: I'm not saying he was faking, but if he wasn't in his right mind, he wouldn't have stood up here when he pled and then straighten up the way he did.

After refusing Respondent's request for a mental evaluation, the judge next rejected the State's recommendation of life sentences for the burglary and rape convictions; instead, he sentenced Smith to concurrent, thirty-year prison terms. Appearing to give some weight to the pre-sentence report (J.A. 26-35), which recommended concurrent, twenty-year terms, the judge explained his sentence:

> He has a lot of good letters. He overreacted to what he suspected his wife of doing. No way can I radicate

[3] Respondent's trial counsel did not have prior knowledge of the felony conviction relied upon by the State, but Respondent did acknowledge a prior conviction in Huntsville for "buying and receiving and concealing," adding, "I didn't know at the time even what a misdemeanor or felony was." (J.A. 21)

> [sic] that. I know the pain and mental problems he caused this woman, and without any more, I am going to sentence him to thirty years in the penitentiary.

One week after sentencing, on January 24, 1986, Smith filed Motions seeking to withdraw his guilty plea, and they were set for hearing on March 17, 1986.[4] Smith was the only witness at the hearing; he denied his guilt as well as the voluntariness of his guilty plea. (J.A. 49-58) The judge denied both Motions. (J.A. 56-58)

In an opinion now reported at 494 So.2d 182 (Ala.Cr.App. 1986), the Alabama Court of Criminal Appeals found reversible error in the trial court's acceptance of Smith's guilty plea without first advising him properly of the maximum sentences. The Court noted the "established rule" of due process "that the defendant must be informed of maximum and minimum possible sentences as an absolute constitutional prerequisite to acceptance of a guilty plea." *Id.*, citing *Boykin* v. *Alabama*, 395 U.S. 238 (1969). In Smith's case, the trial judge "only informed him of the minimum and maximum sentences for a first-time felony offender" and did not advise him of the increased sentences required upon conviction as a habitual offender. *Id.* at 184

The judge whose error caused a reversal of Smith's guilty pleas to burglary and rape received the cases on

[4] The Joint Appendix, prepared and filed before this Court's appointment of Counsel for Smith, reports March 17, 1986, as the filing date for Smith's Motion to Withdraw Guilty Plea. (J.A. 1) In fact, on January 24, Smith filed that Motion along with a Motion for New Trial, each alleging that his "mental and emotional disturbance" made his guilty plea involuntary. Certified copies of the two Motions, not included in the Record below, are filed in the Appendix to this Brief.

remand, granted the State's Motion to reinstate the sodomy indictment (R.426-428) and denied two recusal motions from Smith's new trial counsel. (J.A. 73) The first recusal motion expressed two bases for Smith's fear of vindictive sentencing:

> 1. The Honorable Charles Price has prior to this date taken a guilty plea from said defendant and heard substantive facts from the said defendant that would inflame and prejudice his ruling in a new trial.
>
> 2. The Honorable Charles Price has been in ex parte communications with the defendant prior to his former guilty plea, and said ex parte communications inferred a presumption of guilt by the defendant and as such, would highly prejudice objective rulings by the trial judge in said case.
>
> (J.A. 69)

In the second recusal motion, counsel observed:

> [t]he Defendant, after imprisonment, of course bonded with said trial judge by the United States Mail requesting a reversal on the guilty plea and a demand for a trial . . . Defendant is now before the same judge charged with the same indictments heretofore brought in this Court, and it is Defendant's fear that the Court, having expressed himself as aforesaid after a reconsideration of the previous sentence, will not, if required by a verdict or plea, impose an unbiased, non-prejudiced sentence based on facts and circumstances herein charged. (J.A. 71-72)

The jury trial for the three cases proceeded promptly after the judge declined to recuse himself, and on August 19, 1986, the jury convicted Smith on all charges. (R.459-461) He was sentenced on August 22, 1986, to concurrent life terms for the burglary and sodomy convictions and a consecutive prison term of 150 years on the

rape conviction. (J.A. 83-85) In an effort to justify the significant increase from the sentences imposed after Smith's initial conviction, the judge commented: ". . . since I did not hear all of the testimony during your plea and now at trial have heard all of the testimony . . . the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain. (J.A. 82)

The Alabama Court of Criminal Appeals affirmed Smith's three convictions and his life sentences for burglary and sodomy but remanded the rape conviction for resentencing in accordance with the statutory maximum of "life or not more than 99 years." (J.A. 104) The Alabama Supreme Court did not review the sodomy and rape convictions but did reverse the Court of Criminal Appeals' opinion "affirming the judgment of sentence that enhanced [Smith's] sentence for burglary from 30 years to life imprisonment." (J.A. 108) Based upon its "clear" finding "that the trial judge increased the . . . sentence because of his subjective observations [at trial] and not because of any objective evidence of events subsequent to the . . . first conviction," the Court ruled the sentence enhancement unconstitutional:

> We adopt the language from *Rice* v. *Simpson*, 274 F.Supp. 116 (M.D.Ala. 1967), aff'd, 396 F.2d 499 (5th Cir. 1968), aff'd sub nom., *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), as the applicable rule in Alabama:
>
> > "There can be no increase in a sentence in a criminal case after the sentence is imposed . . . To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and do so successfully is unfair discrimination and does nothing except to serve to limit the use of post-conviction proceedings in the Alabama state courts by prisoners. It denies the prisoner the

> protection of his original sentence as a condition to the right of his appealing his conviction or exercising his post-conviction remedies." 274 F.Supp. at 122.
>
> See, also, *Ex parte Tice*, 475 So.2d 590 (Ala. 1984).
>
> (J.A. 109)

Construing the holding in *Pearce*, the Court found it "abundantly clear that the authorization for an enhanced sentencing 'in light of events subsequent to the first trial' is an exception to the general rule that, absent such evidence, a sentence imposed at the first trial may not be enhanced upon reconviction at the second trial after the first conviction has been overturned on appeal and remanded for a new trial." (J.A. 110)

SUMMARY OF ARGUMENT

Essential to the vitality of due process in the criminal justice system is the concept of fundamental fairness, and its lifeblood is embodied by the corollary ideals of impartiality and objectivity. Its constitutional imperative—well established in criminal jurisprudence—is that the accused, cloaked with a presumption of innocence, be adjudged guilty and punished appropriately only by persons and evidence untainted by bias or illegality. When an accused chooses to acknowledge his guilt, he is no less entitled to the protections of due process in either the guilt or the penalty phases of adjudication. These basic principles must guide a fair analysis of the constitutional propriety of sentence enhancement for a defendant who is reconvicted at trial after his initial conviction is set aside because of a constitutionally defective guilty plea.

I.

North Carolina v. *Pearce*, 395 U.S. 711, 725 (1969), found within the Fourteenth Amendment's due process

clause a constitutional limitation on the enhancement of a reconvicted defendant's sentence: "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." While circumscribing this limitation on occasion, this Court has been consistent and clear in emphasizing that a defendant's right to post-conviction review may not be denied or deterred by the fact or fear of a sentence motivated by retaliation for his exercise of that right. Because of the practical problems inherent in proving actual vindictiveness, the due process right interpreted in *Pearce* applies if the record demonstrates a realistic likelihood of vindictiveness.

This case compels a finding of presumptive vindictiveness because the evidentiary indicators for the *Pearce* rule exist on this record. Additionally, a contrary finding portends judicial abuse in the sentencing process and a concomitant sacrifice of the defendant's due process right not to be convicted by a constitutionally deficient guilty plea; the rationale advanced for this trade-off of due process rights—a perceived threat to plea bargaining—is not logical or reasonable on this record.

All the recognized indicators of presumptive vindictiveness are recorded in this case: the same sentencing authority whose initial adjudication upon Smith's guilty plea gave him not only a personal stake but also an institutional interest in the outcome of Smith's appeal, consequent trial, and resentencing. Notwithstanding the trial judge's disclaimer of actual vindictiveness at resentencing, the realistic possibility of vindictiveness which made Smith apprehensive is strengthened by the judge's stated evaluation—at the initial sentencing—of his personal belief in Smith's guilt, based, in part, on ex parte letters to him, which were neither sanctioned by nor

disclosed to Smith's trial counsel. Upon sentencing Smith after his guilty plea, the trial judge's impartiality was permanently and effectively destroyed, rendering an unconstitutional taint on his resentencing after Smith succeeded in setting aside his guilty plea.

This Court should resist the solicitation from the State of Alabama and the United States Government to expand the constitutional inquiry generated from this specific factual context to a referendum on the plea bargaining system. The question presented is not whether a defendant withdrawing a guilty plea should expect and receive a more severe sentence after trial. Such a question is inappropriate for two reasons: first, it implies that a defendant who pleads guilty may withdraw the plea at will; second, it ignores the evil *Pearce* addressed, vindictive sentencing. If a guilty plea is set aside for failure to satisfy its constitutional prerequisites, penalizing the pleader for challenging that plea lawfully through post-conviction review channels provided by the State serves only to eviscerate the constitutional right he exercised. *Pearce* did not intend this result, and neither does it find sanction in this Court's caselaw articulating the reach of *Pearce*. The narrower focus for the Court in this case is whether the sentence imposed upon reconviction is a product of vindictiveness, which is either actual or reasonably perceived upon a record demonstrating a realistic likelihood of vindictiveness.

The State and the Government entreat this Court to validate a general rule permitting sentence enhancements following trials for defendants who secure reversals of initial convictions grounded on guilty pleas. Their unabashedly stated rationale is that leniency in sentencing upon a guilty plea is, by practice, policy, and theory, a benefit to which a defendant is no longer entitled if he

chooses to attack his guilty plea on any ground. The rule suggested is wholly inconsistent with the sanctity deservedly afforded rights elevated to constitutional stature, and its acceptance by this Court requires, for all practical effects, an abandonment of the due process right defined in *Pearce*, freedom from vindictive sentencing.

II.

Objectivity is the corollary of impartiality in the context of the fundamental fairness requisite for due process in the criminal setting. The focus shifts from the entity empowered to sentence to the information which may be lawfully considered in setting the sentence. In this connection, *Pearce* fashioned a prophylactic rule, requiring that reasons for "a more severe sentence upon a defendant after a new trial . . . be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S., 711, 726.

Smith's trial judge did not state *any* reasons for increasing, from thirty years to life, the burglary sentence presented for this Court's review. The only reasons stated relate to the enhanced sentences for rape and the life sentence for sodomy, neither included here for review; those reasons clearly show that he relied exclusively on information presented at trial concerning commission of the crime.

Considered from the perspective of its underlying objectives, *Pearce's* presumption of vindictiveness is not overcome by information of this character—first because it fails inherently to meet the standard of objectivity and, second because its consideration realistically threatens to encourage, or at minimum to mask, vindictive sentences. This Court's decision in *Texas* v. *McCullough*, 475 U.S.

134 (1986), did not declare a general rule permitting evidence at trial to influence the sentencing of a reconvicted defendant; instead, consistent with the objectives of *Pearce* therein reaffirmed, that decision should be interpreted as simply an acknowledgement that, in the case-by-case consideration of vindictive sentences, the totality of circumstances evident in each case may or may not permit a judge to consider some objective information presented at the trial. In this case, the totality of circumstances surrounding Smith's sentencing after conviction unmasks the vindictiveness which was the likely motivator for the greater sentences imposed.

ARGUMENT

I. A DEFENDANT WHOSE CONVICTION AND SENTENCE ARE REVERSED DUE TO AN INVOLUNTARY GUILTY PLEA MAY NOT BE CONSTITUTIONALLY RESENTENCED BY THE SAME JUDGE TO A LONGER PRISON TERM AFTER HE IS RECONVICTED IN A JURY TRIAL.

A. The Realistic Likelihood Of Vindictiveness Warrants The *Pearce* Presumption When The Judge Whose Error Resulted In Reversal Of Defendant's Guilty Plea And Conviction Resentences Him To A Longer Prison Term After Trial and Reconviction.

The *Pearce* opinion identified two evils of equal significance in the analysis of constitutional restraints on sentencing—actual vindictiveness and apprehension of vindictiveness:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of

> such a retaliatory motivation on the part of the sentencing judge. 395 U.S. 711, 725.

In *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974), the Court affirmed "the lesson that emerges from *Pearce*, *Colten*, and *Chaffin*[5] . . . that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of vindictiveness." This standard remains intact and the Court's caselaw developing this lesson provides guidelines to determine the realistic likelihood of vindictive sentencing.

First, the Court has been disinclined to find presumptive vindictiveness when the record before the Court disclosed varying sentences by different authorities. *See Texas* v. *McCullough*, 475 U.S. 134, 140-141 (1986); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 26 (1973); *Colten* v. *Kentucky*, 407 U.S. 104, 116-117 (1972). When different sentences are involved, the Court explained in *Colten*:

> [i]t may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty. *Id.* at 117.

In Smith's case the judge who sentenced him after he plead guilty is the same judge who sentenced him when he was tried by jury and reconvicted for the same crime after successfully challenging his first conviction. The hazard of vindictiveness which inheres in this fact is enhanced here by the presence of two other hazards deemed relevant by

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[5] *Colten* v. *Kentucky*, 407 U.S. 104 (1972) and *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973).

this Court: affirmative evidence of the sentencing judge's ***personal*** motivation and his ***institutional*** motivation to impose a retaliatory sentence. These hazards were highlighted in *Chaffin* in order to illustrate the diminished possibility of impropriety in jury sentencing rather than judicial sentencing:

> . . . the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals. 412 U.S. 17, 27.

In the context of jury sentencing followed by judicial sentencing upon reconviction, *Texas* v. *McCullough* found no factual basis for a presumption of vindictiveness because, in part, the sentencing judge "had no motivation to engage in self-vindication," thereby precluding any "justifiable concern" about the judge's institutional interests. 475 U.S. 134, 139.

Markedly different on the record in this case is the actual involvement of Smith's trial judge, even before Smith's initial sentencing. Incarcerated pending sentencing after his guilty plea, Smith wrote letters to the judge in an apparent effort to explain his conduct and encourage a lenient sentence. The specific content of the letters is not detailed on the record, but the judge's comments concerning them at Smith's first sentencing hearing leave little doubt that he read these ex parte communications and found them incriminating.

When Smith interrupted the victim's comments and disputed her stated fear that "if [Smith] gets out, he will do it again," the judge used Smith's letters to corroborate

the victim's statement. First, he pointedly reminded Smith:

> "Basically, that's what you said. You told me in a letter you did it." (J.A. 19)

Next, the judge insisted that Smith's alleged girlfriend read Smith's letter, and his intent to have her as satisfied as he was of Smith's guilt is reflected in his question to her after she read the letters: "Are you satisfied he did it now?" (J.A. 20)

Just prior to sentencing Smith, the judge gave another indication of his influence by Smith's letter:

> ". . . You just have to know how to control your problems. And from reading your wife's letter and your letter, you may have been overreacting to what you suspected . . ." (J.A. 22)

The judge's clearly expressed reliance on Smith's letters in sentencing him on January 17 makes almost incredulous his strenuous denial nearly seven months later that the letters affected adversely the fact or appearance of his impartiality. After Smith's conviction was vacated and remanded for trial, the judge denied motions to recuse himself, explaining to Smith's new trial counsel:

> MR. CASON: Your Honor, our client, based on the fact that he gave a prior guilty plea and conferred with the court as to the substantive issues evolving around this particular case, the defendant has asked that the trial judge recuse himself from the case based on that former guilty plea and sentencing, and, also, based on the fact that he claims he did have ex parte with the trial judge by sending letters through the United States mail to the trial judge.
>
> THE COURT: That's not ex parte, because I get mail from people all the time—

MR. CASON: Yes, sir.

THE COURT: —From inmates; those that are charged, those that are not. I don't share those with anyone and really don't take much action on them.

(J.A. 73)

Though the questionable propriety of the trial judge's consideration of Smith's letters is not before this Court, the reality of their influence on the judge directly bears on the likelihood of a retaliatory motivation in his subsequent sentencing.[6] Convinced of Smith's guilt from his self-incriminating letters, the judge discredited himself, in effect, as an impartial, disinterested sentencing authority in any subsequent proceedings required to adjudicate his guilt. Thus, in the trial necessary after reversal of the first conviction, the judge could be viewed properly as an advocate for and protector of the institutional interests of judicial economy and efficiency in the resolution of criminal cases. Privy to facts inculpating Smith from two different sources—the guilty plea proceeding on the record and Smith's "off the record" letters, the judge may very well have considered Smith's trial a nuisance and a burden —personally and institutionally—and, at minimum, an unjustified accommodation for a once-repentant defendant now unwilling to accept the consequences of his admission of guilt. Powerless to undo Smith's success in voiding his conviction grounded on that admission, the trial judge could express his displeasure by enhancing Smith's sentence after conviction at trial, an act which would also communicate his discouragement to any other

[6] Indeed, it is reasonable to believe, as did Smith in moving for the judge's recusal, that a retaliatory motive might influence the judge's action on pre-trial and post-conviction motions, including motions for continuance and for a new trial. (J.A. 69, 70)

convicted felons considering appellate review of guilty pleas and convictions. This is precisely the evil *Pearce* addressed.

Whether the trial judge actually possessed this retaliatory intent is unnecessary to decide; the realistic possibility of his vindictive resentencing is affirmatively shown through facts and circumstances in support of Smith's plainly stated apprehension.

The personal interest of Smith's trial judge in his reconviction and resentencing is evidenced not only by acts depriving him of impartiality at the resentencing but also by his acts constituting reversible error in connection with Smith's initial guilty plea, conviction, and sentence. The opinion of the Alabama Court of Criminal Appeals which vacated Smith's guilty plea specifically documents the trial judge's errors in a manner reasonably likely to instill his motivation to engage in self-vindication.

That opinion first declared that "Smith was never informed of the proper sentences he could receive," 494 So.2d at 182, and next detailed the trial judge's mistakes in that connection. First, at the guilty plea proceeding on January 6, 1986, the judge accepted from Smith a guilty plea form which:

> "did not inform Smith that he would receive two separate sentences or that he would be sentenced as a habitual felony offender. Additionally, the form did not state the correct potential sentence for the first time conviction of a Class A Felony . . ." 494 So.2d at 183.

The trial judge erred again at the guilty plea hearing when he gave Smith, before accepting his guilty plea, an "instruction" that "does not satisfy the constitutional requirement that the accused be informed of the minimum

and maximum potential sentence and is misleading in that it affords the impression that the application of the Habitual Offender Act is discretionary." *Id.* at 183.

In connection with this misleading impression about the impact on Smith's sentencing of any prior felony convictions, the existence of which was not referenced at the guilty plea hearing, the trial judge compounded that mistake, in the opinion of the Alabama Court of Criminal Appeals, by advising Smith at sentencing:

> THE COURT: You [Smith] have a lot of good letters. And you have been in the penitentiary once, but not holding that against you, I will just let you know that. *Id.*

Finally, after the prosecutor produced a certified copy of Smith's prior conviction and requested his sentencing as a habitual offender, the judge neglected to tell Smith that Alabama law required him to "hold against [him]" the prior conviction by increasing his maximum, potential sentence.

All these judicial errors deprived Smith's guilty plea of its "absolute constitutional prerequisite"—"that the defendant . . . be informed of maximum and minimum possible sentences." *Id.* at 182, citing *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

Smith's trial judge had reason to be chagrined by the reviewing court's characterization of "the confusion in the circuit court" and by its reluctant remand of the case:

> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Boykin*, 395 U.S. at 242, 89 S.Ct. at 1711. Under these circumstances, this Court has no alternative but to reverse the judgment of the circuit

> court and remand this cause for further proceedings. *Id.* at 184.

Pearce's presumption of vindictiveness is, therefore, appropriately applied in this case to guard against the realistic likelihood of vindictive sentencing against Smith, whose exercise of post-conviction review rights exposed judicial error of reversible magnitude on a well-defined subject in constitutional jurisprudence.

B. A Defendant Convicted After A Guilty Plea Is No Less Entitled Constitutionally To Freedom From Vindictive Resentencing By A Judge Whose Error In The Initial Sentence Required A Reversal Of That Conviction.

The State of Alabama, forcefully supported by the Government as amicus curiae, contends that *Pearce's* presumption of vindictiveness should not apply in the context of reconviction following a withdrawn guilty plea: "To apply the presumption of a post-plea-bargain situation," the State contends, "would totally destroy the plea bargaining system." (Brief of Petitioner at 14) Foretelling a similar doom for that system in federal criminal practice, the Government suggests that it is "entirely legitimate" to treat differently a defendant who has pleaded guilty—who "may well deserve a more lenient sentence"—and one who has gone to trial and "may well not have earned specially lenient sentencing treatment." (Brief for the United States at 8)

While this contention unnecessarily broadens the question presented in this case, it also equates improperly valid policy concerns about a practice which—while sanctioned by this Court—is not a constitutional right, with this Court's constant vigilance to protect a recognized constitutional right. Lest this Court be tempted to adopt this spurious focus on the sanctity of plea bargaining, its

firmly established adherence to two basic, constitutional premises bear repeating here.

First and highly relevant is this Court's tradition of upholding a defendant's right not to be penalized by judicial error, particularly error of a constitutional magnitude. As Justice Stewart observed in writing for the *Pearce* Court:

> It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for having succeeded in getting his original conviction set aside. *Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such punishment, "penalizing those who choose to exercise" constitutional rights "would be patently unconstitutional." United States* v. *Jackson*, 390 U.S. 570, 581, 20 L.Ed.2d 138, 147, 88 S.Ct. 1209 . . . But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law." 395 U.S. at 724 (emphasis added)

The second constitutional premise relevant to the Petitioner's contention is that a guilty plea, because it involves the waiver of several constitutional rights, must satisfy constitutional prerequisites. Due process requires that a guilty plea be a voluntary, knowing, and intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences," including the "maximum and minimum possible sentences." *See Brady* v. *United States*, 397 U.S. 742, 748 (1970) and *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969).

Applied to Smith's case, these principles are accompanied by undisputed facts: first, Smith's guilty plea was defective based on constitutional error by the judge who accepted the plea; second, Smith had a protected right to challenge the constitutional propriety of his guilty plea and conviction.

Smith did not simply withdraw or repudiate a plea agreement, as suggested by the Petitioner's argument. In fact, after the trial court accepted the plea agreement—Smith's guilty plea to burglary and rape and the State's dismissal of the sodomy indictment—Smith had neither a statutory nor a constitutional right to repudiate the agreement merely because he had changed his mind or did not like the sentence. The agreement was final subject only to its satisfaction of the constitutional prerequisites for voluntariness and intelligence, and Smith never relinquished his right to appellate review of these constitutional prerequisites. To hold otherwise is to deprive defendants who plead guilty of any due process protections for their convictions while according such protections to defendants convicted after trial; such a distinction is neither rational nor right.

Smith should not be compelled by virtue of his guilty plea to forfeit one due process protection—a constitutionally valid guilty plea—in order to secure another—a sentence free from vindictiveness. If he risks the latter by exercising constitutional rights to secure the former, he is thereby deprived of the essence of due process in the criminal process, fundamental fairness. That significant deprivation is not justified by the perceived need to accommodate plea bargaining, however salutary its goals. Indeed, in this case, the State did not lose any benefit from its bargain; it agreed to dismiss one charge if Smith plead guilty to two others. Subsequent to reversal of

Smith's plea, the State regained its former position by reinstating that charge.

II. EVIDENCE PRESENTED AT TRIAL RELATING TO COMMISSION OF THE CRIME, STANDING ALONE, IS NOT SUFFICIENT IN THIS CASE TO OVERCOME THE PRESUMPTION OF VINDICTIVENESS.

Pearce's prophylactic rule is clearly stated:

> [w]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. 395 U.S. at 726.

Smith's trial judge did not state any specific reasons for enhancing the burglary sentence, and his general explanation for his overall sentencing relates to evidence presented at Smith's trial:

> When you entered your plea, you told me your side of the story. And of course, now that the court has had a trial and heard all of the evidence. . .
>
> ***
>
> But under North Carolina versus Pearce . . ., the court finds that since I did not hear all of the testimony during your plea and now at trial have heard . . . all of the testimony which consisted of raping the victim at least five times, and after the second or third time, then causing her to perform oral sex on you, and then of course, at least raping her one or two more times after that, threatening her life with the knife and all, after looking at this matter, and your mental outlook on it and your position during the trial and what you said, the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain. (J.A. 82)

The Alabama Supreme Court deemed these reasons deficient under *Pearce* because "it is clear that the trial judge increased the petitioner's sentence because of his subjective observations and not because of any objective evidence of events subsequent to [Smith's] first conviction. (J.A. 109) This court should affirm that holding for three reasons:

1. The Standard Of Objectivity Is Absolutely Essential For Due Process.

Any abandonment or diminution in the requirement of objectivity is unfathomable and would constitute a giant step backwards in this Court's commitment to guarantee an accused a fundamentally fair trial. Consistent with the highest aims of due process is a requirement that information admissible to affect the defendant's guilt or his penalty be limited to facts, conditions, or circumstances perceived and applied without distortion by personal feeling, prejudices, or interpretations.

Though the decision reflected some retreat from a literal interpretation of the *Pearce* rule, *Texas* v. *McCullough* reaffirmed this Court's insistence on the standard of objectivity:

> Perhaps then the reach of *Pearce* is best captured in our statement in *United States* v. *Goodwin*, 457 U.S. at 374, 73 L.Ed.2d 74, 102 S.Ct. 2485:
>
> > "In sum, the Court [in Pearce] applied a presumption of vindictiveness, which may be overcome only by objective information . . . justifying the increased sentence." 475 U.S. at 142.

2. The Information Considered By The Trial Judge Does Not Satisfy The Standard Of Objectivity.

The trial judge's stated reasons for enhancing Smith's sentence lack objectivity, in part, because they inaccurately summarize the actual testimony. The victim did not testify that her life was threatened with a knife. Though her attacker "came running towards [her] with the knife in his hand" (R.134), she testified that "he kept saying that I'm not going to hurt you or I'm not going to hurt your children." (R.136) In fact, the victim's testimony disclosed that the knife was not always in her attacker's hands during the course of the assault:

> He had the knife sometimes in his hand, and he had laid the knife on the bed, and at one time, he had placed the knife in my hand. (R.138) . . . He said, see, here's the knife. He got the knife and he placed it in—I had my hand extended out, so he put the knife in my hand and folded my hand over the knife and brought it up to his chest. He said, see, you've got the knife; go ahead and kill me. And I told him that I couldn't kill him. (R.140)

The judge's statement of the evidence on this one issue highlights the subjectivity inevitable in having the sentencing authority evaluate testimony presented in a jury trial, a difficult task even for the assigned trier of fact. Here, Smith, who denied being the attacker, gave testimony in direct contradiction to the victim's. The jury—presumably bereft of personal bias or prejudice grounded on prior knowledge of the crime, the accused, or the victim—had the duty to reconcile conflicting testimony but was aided by the usual jury instructions designed specifically to make that process as objective as possible; those objective guidelines relate, for example, to permissible inferences from the evidence, demeanor of a witness and his interest in the outcome, presumptions,

and burdens of proof. (R.352-365) Unlike any of the twelve jurors, however, the judge did not listen to the testimony at trial untainted by personal bias or prejudice grounded on prior knowledge of the crime, the victim, or the accused. His objectivity was significantly impaired, if not wholly destroyed, by his conduct of the guilty plea proceeding, his admitted consideration of ex parte letters implicating the defendant[7], and his conduct at defendant's first sentence hearing, which included an inexplicable but successful effort to demonstrate the defendant's guilt to his alleged girlfriend. Under these circumstances, the trial judge's purported reliance on testimony detailing the crime is precisely the type of sham that conveniently masks vindictiveness.

What the judge failed to say, in explaining the enhanced sentences, is as significant to this analysis of objectivity as his actual statements. Contrary to the *Pearce* mandate of "factual data—made part of the record", he proffered no reason at all to explain enhancement of the sentence for burglary, which is the only sentence presented here for review. Since *Pearce* requires such reasons to "affirmatively appear" on the record, this Court has no basis for upholding the constitutional legitimacy of the burglary sentence.

Even if the judge intended to justify increasing the burglary sentence from 30 years to life by reference to trial testimony detailing the rape and sodomy also committed, and the use of a knife, reliance on this information is misplaced. Smith was tried and subject to separate punishment for burglary, rape, and sodomy; Alabama law

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[7] Since these letters are not a part of the Record, the judge's stated reliance on the testimony at trial is even more suspect, for they may have included the very details of the offense presented at trial.

provided that the use of a weapon, such as a knife, could enhance the prison term for any of the three offenses. Consequently, it is hardly defensible to justify Smith's greater sentence for burglary following his trial by referring to his commission of other crimes at the time of the burglary, a fact known to the judge well before the trial. The validity of such a justification is clear because this record discloses not only conviction for those other crimes but also sentencing by the same judge to the maximum, life term for one, and a 150-year sentence for the other.

When the judge sentenced Smith initially to a thirty-year prison term for burglary, he knew from the guilty plea proceeding that the assailant gained nighttime entrance to the victim's residence by cutting a screen with a knife and going through the window. (J.A. 13-16). At trial no evidence was offered which added any substantive details to the facts of the burglary. The victim gave no testimony relevant to the burglary other than to acknowledge that police officers pointed out to her the kitchen window as the assailant's point of entry (R.153), and that she did not invite the attacker to her residence or otherwise consent to the attack.

Testimony concerning the burglary from the state's second and final witness, police investigator Grin[illegible]ley, included no details not disclosed to the judge in connection with the first conviction. (R.183, 197)

In sum, the record is silent concerning any properly considered facts to explain an enhancement of Smith's burglary sentence from thirty years to life. More importantly from the standpoint of *Pearce's* rule, the sentencing judge offered no explanation to rebut the presumption of vindictiveness inherent in that sentence.

3. Preservation Of The Due Process Right Affirmed By *Pearce* Requires This Court To Reject A General Rule Permitting A Judge To Justify Increasing Sentences For Reconvicted Defendants Merely By Reference To Evidence At The Trial Concerning Commission Of The Crime.

Pearce required that the reasons for enhanced sentences after reconviction not only be objective but also concern "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." In *Wasman* v. *United States*, 468 U.S. 559, 569-570 (1984), the Court expanded the scope of "conduct of the defendant" by upholding an enhanced sentence which was based on "consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial." Even though the conduct underlying the intervening criminal conviction had occurred and was disclosed to the judge at the initial sentencing, *Wasman* held that consideration of the conviction was "manifestly legitimate" and "amply rebuts any presumption of vindictiveness." *Id.*

In response to arguments that the plain language of *Pearce* established temporal limitations on the type of information to justify sentence enhancement, *Wasman* observed: "*Pearce* is not without its ambiguities . . . we find it unnecessary, however, to reconcile these apparent ambiguities." Instead, the Court's narrower holding rested on an opinion that "no logical support" exists "for a distinction between 'events' and 'conduct' of the defendant occurring after the initial sentencing insofar as the kind of information that may be relied upon to show a nonvindictive motive is concerned." *Id.* at 571-572.

Smith's case squarely presents the question implicit in the *Pearce* ambiguities not clarified by *Wasman:* may the

defendant's trial after reversal of a guilty plea be the source of the "events" or "conduct" used to justify a sentence greater than that imposed after the first conviction and, if so, may the details and flavor of the crime, presented at trial, constitute the criterion of "objective information." Contrary to arguments in brief from the State and the Government, *Texas* v. *McCullough* does not mandate a response in the affirmative.

This Court in *Texas* v.*McCullough* appeared reluctant to embrace a general rule elevating the testimony at retrial automatically to the stature of "objective information" sufficient alone to overcome the *Pearce* presumption:

> . . . we have restricted application of *Pearce* to areas where its "objectives are thought most efficaciously served," (citation omitted). Accordingly, in each case, we look to the need, under the circumstances, to "guard against vindictiveness in the resentencing process." (citation omitted) 473 U.S. at 138.

Even a cursory comparison of the factual contexts in this case and *McCullough's* highlights the wisdom of an approach which examines the need in the context of the totality of circumstances presented in each case. The need to guard against a vindictive resentence in Smith's case is compelling, in large part, because of the sentencing judge's demonstrated lack of impartiality. On the other hand, the court was impressed—based on the record—with the impartiality of the judge who imposed the enhanced sentence in *McCullough*, noting that (1) a jury rather than the judge imposed the initial sentence, (2) the judge granted the convicted defendant's motion for a new trial, finding merit in his claim of prosecutorial misconduct, and (3) the defendant, upon retrial, chose to be sentenced by the judge rather than the jury. *Id.* at 139. A

finding of presumptive vindictiveness, on these facts—none of which coalesce in Smith's case—was not deemed appropriate.

The *McCullough* Court's discussion of the evidence permissible to rebut vindictiveness (*Id.* at 141-144) must first be viewed in the context of its specific finding that *Pearce's* presumption of vindictiveness did not apply. The Court did note approvingly the judge's "careful explanation . . . for the sentence imposed," and the explanation included reliance "on the testimony of two new witnesses which she concluded (with "specific findings") "had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial." However, even though this Court characterized such testimony as "objective information . . . justifying the increased sentence," it noted other "objective information" in the form of a finding that McCullough committed the crimes within four months of his release from prison. *Id.* at 144.

When the presumption of vindictiveness, not found in *McCullough*, does apply, there is sound reason for analyzing the overall circumstances of the case before permitting the judge to justify an increased sentence by reliance solely on information from the trial. If, as in Smith's case, the judge records an explanation which only generally refers to having "heard all of the evidence" and specifically relates only the details and flavor of the crimes which resulted in the sentences not presented for appellate review, he has not complied at all with the *Pearce* rule, and an appellate tribunal has no basis to determine the constitutional legitimacy of the enhanced sentence in controversy.

Moreover, a carte blanche rule which permits sentence enhancement to be justified solely by conduct or events

disclosed at trial creates much too convenient a mechanism for masking a vindictive sentence and thereby poses a realistic likelihood that the constitutional right to a nonvindictive sentence will be meaningless in that the trial judge may routinely explain his sentence by reference to the trial, which will indisputably furnish many more details about the offense and, frequently, much more information about the accused and the scope of his participation in the crime. As one commentator cautioned: "If a court on retrial could justify an increased sentence on the ground that it now had additional knowledge concerning the defendant's participation in the offense, then the *Pearce* limitation could be evaded in almost every case." 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.1 at 176 (1984)

Acknowledging the difficulties of proving actual vindictiveness, the need to minimize the defendant's reasonable apprehension of vindictiveness, and the realistic likelihood that an overly broad reading of *Pearce* will facilitate the masking of vindictiveness, the federal appellate courts have struggled to fashion not an absolute rule but a fundamentally fair result weighing all the relevant circumstances, an effort consistent with the case-by-case "need" analysis suggested by *McCullough*. See, e.g., *United States* v. *Gilliss*, 645 F.2d 1269, 1281-1284 (8th Cir. 1981) and *United States* v. *Bello*, 767 F.2d 1065, 1068-1069 (4th Cir. 1985)[8]

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[8] The appellate court cases cited by the State (Brief of Respondent at 24) and the Government (Brief for the United States at 13, n.5) do not support the suggestion of "near uniformity" on the specific issue posed on this record. In *McKenzie* v. *Risley*, 842 F.2d 1525, 1536-1537 (9th Cir. 1988) and *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1064-1065 (5th Cir. 1987), both capital cases presenting several issues for habeas review, the sentencing issue was grounded upon plea negotiations and proposals rather than the implemented plea bargain in Smith's case. Similarly, the habeas petitioner in *Hitchcock* v. *Wainwright*, 770 F.2d 1514 (11th Cir. 1985) contended that the trial court, in imposing a death sentence, improperly considered his refusal to plead guilty in a plea bargain offered by the prosecutor and the judge. The defendant in *United States* v. *Carter*, 804 F.2d 508, 510; 513-515 (9th Cir. 1986) was allowed to withdraw his guilty plea when the trial judge, on the day of sentencing, demanded that restitution be included as a part of the agreement. In *United States* v. *Townsend*, 796 F.2d 158 (6th Cir. 1986), the defendant was allowed by this trial court, for reasons not reported, to withdraw his guilty plea. Finally, the defendant in *Frank* v. *Blackburn*, 646 F.2d 873 (5th Cir. 1980) rejected an offered plea bargain which included a recommended sentence.

CONCLUSION

The judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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